SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 426

JEREMIAH J. KELLEY, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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JEREMIAH J. KELLEY, *Petitioner,*

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Jeremiah J. Kelley, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming the judgment of conviction entered by the United States District Court for the Southern District of New York on September 27, 1966.

OPINION BELOW

The opinion of the Second Circuit Court of Appeals, not yet reported, is printed herein as Appendix A.

JURISDICTION

The judgment of the Second Circuit Court of Appeals was entered on May 27, 1968. A petition for rehearing was denied on July 22, 1968. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2(b):

> "(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

18 U.S.C. § 1084(a):

> "(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers in any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both."

18 U.S.C. § 1952(a) and (b):

> "(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> (1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter perform or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3) shall be fined not more than five years, or both.

(b) As used in this section "unlawful activity" means

(1) any business enterprise involving gambling . . . offenses in violation of the laws of the State in which they are committed or of the United States . . . ."

QUESTIONS PRESENTED

1. Whether the government failed to prove a violation of 18 U.S.C. §§ 1084 and 1952, when it submitted its case to the jury on the theory that the petitioner, a bookmaker, *caused out-of-state bettors to use an interstate facility*—the telephone—to transmit gambling information since Congress specifically exempted the bettor from these statutes?

2. Whether this Court's decision in *Marchetti* v. *United States*, 390 U.S. 39 (1968), holding that the wagering tax statutes, 26 U.S.C. §§ 4401, 4411-12, violated a defendant's right against self-incrimination, requires that petitioner be given a new trial on all counts in the indictment because the wagering tax counts tended to incriminate the petitioner on the remaining counts based on federal gambling violations of 18 U.S.C. §§ 1084 and 1952?

3. Whether the systematic exclusion of women from the jury rolls and panels in the Southern District of New York violated (1) petitioner's constitutional right to a jury selected in a nondiscriminatory manner from a cross-section of the community and (2) the selection procedures set forth in the applicable federal statutes, 28 U.S.C. §§ 1861-64?

STATEMENT OF THE CASE

The petitioner, Jeremiah J. Kelley, was convicted on all counts of a four-count indictment. Counts One and Two allege that the petitioner violated 18 U.S.C. §§ 1084 and 1952, respectively, in that he caused bettors to use interstate telephone facilities to transmit gambling information in furtherance of an unlawful bookmaking operation. Counts Three and Four charge that the petitioner violated the federal wagering tax statutes, 26 U.S.C. §§ 4401, 4411-12, in that he failed to register and obtain a special wagering tax stamp during the years 1960-64. R. 6a-8a.[1]

The jury deadlocked and a mistrial was declared at the first trial in April 1966. R. 3a. Petitioner was found guilty on all counts at a second trial in August 1966. R. 4a. On September 27, 1966, the petitioner was sentenced pursuant to 18 U.S.C. § 4208(b). Pending a full mental and physical examination by the Bureau of Prisons as required by § 4208(b), the Court

[1] The designation "R." is used herein to refer to the Appellant's Appendix in the United States Court of Appeals for the Second Circuit. The designation "Supp. R." is used herein to refer to the Appellant's Supplemental Appendix in the United States Court of Appeals for the Second Circuit which is printed at the conclusion of Appellant's Supplemental Brief in the Court of Appeals. The designation "App." refers to the Appendix to this petition.

imposed maximum consecutive sentences totaling nine years. R. 4a.

On appeal to the United States Court of Appeals for the Second Circuit petitioner's conviction on Counts One and Two was affirmed. His conviction on Counts Three and Four was reversed and the counts ordered dismissed in accord with this Court's decision in *Marchetti* v. *United States,* 390 U.S. 39 (1968). Petitioner now seeks a Writ of Certiorari in this Court.

The Evidence at Trial

The evidence shows a bookmaking operation which for purposes of appeal can be simply summarized.

During the years 1960 through 1964, various private citizens wishing to place wagers on sporting events would call EL 5-2828 in New York City. This number is one of the sequence numbers for the Sherry Netherlands Hotel whose main number is EL 5-2800. The bettor would ask the operator who answered for a "Mr. Mellon." The operator would always reply that Mr. Mellon was out. The bettor would then leave a code name along with information on where he could be reached. Shortly thereafter, the bettor would receive a return call from a person who would identify himself as Mr. Mellon. The bettor would then obtain the "line" which was the current betting odds being offered by Mr. Mellon on sporting events. The bettor, if he chose, could then place a wager on a particular event or events at the quoted odds. R. 46a-48a, 50a, 51a, 53a-55a, 58a-61a. At various times thereafter the bettor would receive a slip of paper with an accounting of his recent betting activity. The slip would show the bettor's current debit or credit balance. Each bettor had an

agreed figure for settlement. When the credit or debit reached that amount, the bettor would either pay his losses or receive his winnings. R. 44a-45a, 48a, 55a-56a, 61a.

According to the testimony of several of the bettors, this form of betting procedure was typical of many bookmaking operations. The bettor never knew the identity of the bookmaker returning the bettor's calls or where the calls were made from. At most, he would know the messenger, if he were regular, who brought or collected the winnings and losses. R. 42a, 49a-50a, 59a-60a.

In the case at bar, Mr. Cavanaugh from Detroit, Michigan, and Mr. Seigfried from Tulsa, Oklahoma, stated that they did not know the identity of Mr. Mellon. R. 52a, 57a. The other witnesses who were from New York, including Mr. Bergson, who moved to Arizona in the fall of 1962, all testified that they knew the petitioner personally. They stated they were normally able to locate the petitioner at a number of well-known restaurants and bars in Midtown Manhattan. They further testified that he personally called them back to give them the "line" and take their bets after they had placed a call to Mr. Mellon at EL 5-2828. R. 44a, 46a-48a, 183a-84a, 58a-59a, 62a. In addition, telephone records for the petitioner's apartment at 86-25 Van Wyck Expressway, Brooklyn, New York, indicated that during the months of January, February, and May 1964, calls were placed from this number to the various bettors who lived outside New York State.

The bettors involved in the case at bar bet anywhere from $5,000 to $100,000 a year. R. 40a, 44a, 51a, 55a-56a, 61a.

On June 3, 1964, the petitioner was arrested. A number of items were found on his person including an accounting slip for one of the bettors, a list of phone numbers plus code names, and about $7,000 in cash. R. 64a. The phone numbers were one digit off the true number of the witnesses whose code names were identified. R. 65a-66a. Finally, Mr. Crawford testified that he was supposed to receive $7,000 in winnings that day from the petitioner. R. 41a.

Appropriate Internal Revenue Service employees testified that the petitioner had not either registered or obtained a tax stamp in accord with 26 U.S.C. §§ 4411, 4412, in New York or Long Island. R. 66a-68a.

REASONS FOR GRANTING THE WRIT

1. Even though the facts might support alleged violations of 18 U.S.C. §§ 1084 and 1952, the government went to the jury on a theory which Congress determined was legal conduct.

On the facts as summarized herein, the government could have charged the petitioner with personally using the phone at his home in Brooklyn, New York, to call bettors in other states to take their bets, thus establishing direct violations of 18 U.S.C. §§ 1084 and 1952. However, this theory would have required that the United States Attorney for the Southern District of New York send the case to the Eastern District of New York for indictment and prosecution since only the Eastern District has venue over Brooklyn. The government might have proved under the existing indictment that the petitioner used the phone in the Southern District of New York when his agents at the Sherry Netherlands Hotel received calls and messages from out-of-state bettors. However, for reasons known

only to the government, it agreed to strike from the indictment the allegation that the petitioner "used" the phone and dropped any aiding and abetting charge based on 18 U.S.C. § 2(a). R. 75a, 107a-08a.[2].

Instead, the government chose the one theory Congress had specifically exempted from the substantive statutes. It went to the jury on the theory that pursuant to 18 U.S.C. § 2(b), the petitioner *caused the out-of-state bettors to use the phone* by calling EL 5-2828 at the Sherry Netherlands Hotel in New York. If this theory stands, the government will be permitted to use § 2(b) to extend any criminal statute far beyond the realm of Congressional intent.

Section 1084 of Title 18 draws an unusual distinction. It splits an interstate phone call between a bettor and a bookmaker in half and makes it illegal only for the bookmaker—not the bettor. As first drafted, the statute would have applied to both, although the Department of Justice had no desire to incriminate the bettor. Then Attorney General Kennedy explained why it had been drafted to apply to both:

> "[W]hen a social wagerer uses the telephone to place a bet with the professional, he uses the same facility as the professional. We felt that it would be an awkward situation legislatively to provide that a social bet sent by telephone becomes professional information in the bookies office. If the average citizen made a noncriminal wager, the professional could state that he was accepting the same noncriminal wager."

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[2] When the indictment was sent in to the jury room on the jury's request, the prosecution agreed with the defense that the word "use" should be stricken from the indictment leaving only the language that petitioner did "cause to be used" an interstate facility. The court so ordered. R. 107a-08a.

Hearings on S. 1653 through S. 1665 before the Senate Committee on the Judiciary, 87th Cong., 1st Sess., p. 13, 278 (1961) [hereinafter referred to as *"Senate Hearings"*]. Congress, however, chose to indulge in the "awkward situation" referred to by Kennedy and specifically sought to exclude the social bettor from the statute. It added the provision that whoever used the phone must be "engaged in the business of betting and wagering" before the section applied. See *Senate Hearings,* pp. 279, 278; *S. Rep.* 588, 87th Cong., 1st Sess., p. 2 (1961). This "business enterprise" requirement, as Senator Kefauver called it, was similar to that found in the draft bill of section 1952 and was intended to accomplish the same purpose. *Senate Hearings* p. 279. And, as the Department of Justice made clear in the hearings on section 1952, the social bettor could not be brought within the scope of these sections even by use of the aiding and abetting statute, 18 U.S.C. § 2.[3]

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[3] When Herbert J. Miller, Assistant Attorney General for the Criminal Division, testified on the administration bill, he engaged in the following exchange with Senator Ervin:

> "Senator Ervin. Would not any person, who might not have any connection whatever with that business, who merely goes out to gamble, be engaged in a business and therefore be guilty?"
>
> "Mr. Miller. No."
>
> "Senator Ervin. Oh, yes, because anybody who aids and abets another in carrying on an unlawful enterprise is guilty. He would be guilty of aiding and abetting."
>
> "Mr. Miller. Senator, I cannot go along with you on that interpretation. I am sorry sir, because, in the first place, a man who goes to gamble is not aiding except perhaps financially. He is actually trying to take money away from the

As a consequence of splitting the call in half, "use of an interstate wire facility" is not an element of the crime until it is determined who is using it. Such a division is not without precedent. During Prohibition, Congress split the sales transaction of liquor between the seller and a purchaser for personal consumption—only the seller violated the statute. *United States* v. *Farrar*, 281 U.S. 624 (1930). The purchaser could not even be charged as an aider and abettor or co-conspirator. See cases collected *Annotation*, 68 A.L.R. 895 (1930).

In the case at bar, the government went to the jury solely on the theory that the petitioner "caused" *the bettor-witnesses to use the phone* for the transmission of gambling information. The court instructed the jury that the proscribed use of the phone was established only if it found beyond a reasonable doubt that the petitioner "caused a single individual [bettor] to telephone Eldorado 5-2828 in New York City from an-

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bookmaker rather than give him money. I sincerely doubt that he could be considered an aider and abettor."

• • •

"Senator Ervin. Well you tell me that people who go there for gambling, that is, to take advantage of the facilities, are not aiding, abetting and encouraging the carrying on of that gambling enterprise."

"Mr. Miller. Not within the language, not within the purview of the aiding and abetting statute; no, sir."

"Senator Ervin. What is aiding and abetting? It is one who aids and abets, or encourages another to commit a crime, is it not?"

"Mr. Miller. But, as I say, they are, in effect, on the other side of the fence. They are trying to take the money instead of giving it. Admittedly, they usually end up giving it instead of taking it." *Senate Hearings*, p. 256.

other state . . . . " R. 92a-93a. And, as the prosecutor told the jury in his summation:

> "Next the Government, as I state, has to prove that Mr. Kelley caused the telephone lines—or rather, caused each of these bettors or at least one of them to use the interstate telephone lines for the prohibited purpose." Tr. 458.

Accord, Tr. 462-63 (with respect to § 1952).[4]

Thus the government went to the jury alleging an act which Congress had specifically exempted from coverage of the two substantive statutes in question. This failure of proof is not rectified by invoking section 2(b). As the Reviser's Note points out, this section simply codified existing law, and does not enlarge the scope of the criminal section involved.[5]

In the Second Circuit, the government did not contest petitioner's allegation that the sections 1084 and 1952 do not apply to the bettor-witnesses' use of the phone.[6] Rather, it argued that petitioner should not

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[4] The designation "Tr." refers to the original Transcript of Proceedings in the trial court on August 11, 1966, before Honorable Irving Ben Cooper.

[5] According to the Revisor's Notes, the section was "added to permit deletion of such phrases as 'causes or procures'." It was written to accord with a number of existing decisions interpreting the word "cause," and it was not intended to broaden the scope of existing law. See, *e.g., Pereira* v. *United States,* 202 F. 2d 830, 837 (5th Cir. 1953), *aff'd,* 347 U.S. 1 (1954). Moreover, such leading cases as *United States* v. *Giles,* 300 U.S. 41 (1937), make absolutely clear that even where statutes prior to 1948 did not include the phrase "causes or procures" such a meaning would be read into the statute.

[6] Brief for the United States of America in the Second Circuit Court of Appeals. p. 15.

be allowed to avoid the statutes by setting up an evasive scheme for being contacted.[7] However, as petitioner has already pointed out, the government had two valid theories of prosecution which it chose to ignore; thus it, not the petitioner, avoided the statutes.

The Second Circuit rejected the point with the statement:

> "A person may be held responsible as a principal under 18 U.S.C. § 2(b) for causing another to do an act which would not have been criminal if directly performed by that other person. *United States* v. *Lester*, 363 F.2d 68, 72-73 (6th Cir. 1966), cert. denied . . . ."

Grammatical confusion aside,[8] this statement presumes the very fact in issue herein. Prerequisite to the above statement and every § 2(b) case is the commission of an

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[7] *Id.* at 15-16.

[8] The term "other person" at the conclusion of the statement modifies the term "a person" starting the statement. It should read:

> "A defendant may be held responsible as a principal under 18 U.S.C. § 2(b) for causing another to do an act which would not have been criminal if directly performed by that defendant."

Such was the case in *Lester*. In *Lester* private citizens were charged with causing police officers to violate the civil rights of Negroes. These private citizens could not directly violate the statute since the statute requires action under the color of state law. Even though the police officers had been acquitted (due to a failure of proof of their criminal intent), the private citizens could be held responsible under Section 2(b) which attributed the police officers' unwitting, unlawful conduct to the private citizens.

act proscribed by a criminal statute.[9] As the Tenth Circuit recently stated in *Breeze* v. *United States*, No. 9646, decided July 5, 1968, slip opinion p. 11, in analyzing 18 U.S.C. § 2:

> "But that language [§ 2] neither defines nor denounces as criminal any act or omission which, without it, would have been lawful. It is rather a statutory canon defining an ingredient of criminal responsibility generally, than the definition by law of any crime."

In the case at bar, the Second Circuit has attributed to the petitioner through the vehicle of § 2(b) responsibility for an act which was specifically exempted by Congress from the scope of 18 U.S.C. §§ 1084, 1952—namely, the bettor's use of the telephone.

While the objective of § 2(b) as paraphrased in *Breeze* and explained in the Revisor's Note is clear, an application of the statutory language to specific facts is not easy. The section appears to contemplate a substitution of the person charged under § 2(b) with the person or instrumentality that actually did the act alleged to be unlawful. If the substantive offense still exists after the substitution, then § 2(b) is properly applied. However, in many § 2(b) situations, the person charged is incapable of doing the act himself. For example, the private citizens charged in *Lester* could not commit the unlawful act since the statute applied

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[9] *Lester* is a good example. When the police officers violated the civil rights of Negroes under the color of state law, an act proscribed by the applicable federal statute was committed. The only element missing from a successful prosecution of the police officers was proof of their criminal intent. Precisely the contrary took place in the case at bar. The bettor-witnesses had full knowledge of every aspect of the transaction. However, their act of using the phone had been exempted by Congress from the substantive statutes.

only to persons acting under the color of state law. Similarly, in the case at bar, the petitioner, a bookmaker, cannot substitute himself for the bettor. It would destroy the betting transaction since the petitioner would then be betting with himself. Consequently, *Lester* and the case at bar must proceed under the "another" language of § 2(b). See *United States* v. *Lester*, 363 F.2d at 72-73. In *Lester* the analogy is workable since the police officers would have committed the substantive offense if they acted knowingly. Therefore § 2(b) was properly applied. In the case at bar, the "another" can only be the bettor who does not violate the substantive statutes no matter how knowing his actions. Consequently, section 2(b) is rendered inapplicable.

Any ruling which has the result of enlarging the scope of every criminal statute raises a serious issue worthy of this Court's attention. For as Judge Learned Hand stated in *United States* v. *Chiarella*, 184 F.2d 903, 909 (2d Cir. 1950), in disapproving a jury instruction on § 2(b) which was limited to reading the statute itself, " 'causing an act to be done' covers any acts which are necessary steps in the events that result in the crime." Such an interpretation could ensnare many innocent people.[10] As an example, all of the bettor-

[10] Judge Hand noted in *Chiarella* that such a broad interpretation would be contrary to the Second Circuit's decision in *United States* v. *Falcone*, 109 F. 2d 579, 587 (2d Cir. 1940), *aff'd*, 311 U.S. 205 (1940). In *Falcone*, the court had held that a sugar dealer was not guilty of aiding and abetting when he sold sugar in the ordinary course of business to one whom he knew was using the sugar to manufacture illegal whiskey. Apparently what concerned Judge Hand in *Chiarella* was the fact that dealer in *Falcone* was causing the others to produce the whiskey in that he knowingly provided an ingredient without which the whiskey would not have been made. Thus, under a literal interpretation of § 2(b), the dealer in *Falcone* would be a principal.

witnesses in the case at bar would be inculpated in spite of Congressional intent to the contrary.

2. Counts Three and Four of the indictment herein charged violations of the wagering tax statutes, 26 U.S.C. §§ 4401, 4411-12. As a result of this Court's decision in *Marchetti* v. *United States*, 390 U.S. 39 (1968), the Second Circuit reversed petitioner's conviction on these counts and ordered them dismissed. Petitioner contends that submission of these invalid counts prejudiced the jury's consideration of Counts One and Two and entitles him to a new trial on these counts as well.

All the counts herein are related. As *Marchetti* itself noted, compliance with the wagering tax statutes tends to incriminate a defendant under 18 U.S.C. §§ 1084 and 1952, the statutes involved in Counts One and Two. 390 U.S. at 44. Indeed, the trial court referred back to and incorporated by reference his charge on §§ 1084 and 1952 in order to define the wagering tax requirement that the petitioner must be in the business of accepting wagers. R. 84a-85a, 95a. In effect, Counts Three and Four charge petitioner with having failed to confess to an essential element of Counts One and Two. For, if he had registered and obtained a stamp, they could have been introduced against him on Counts One and Two as admissions that he was in the business of betting and wagering. See e.g., *United States* v. *Zizzo*, 338 F.2d 577 (7th Cir. 1964).

It is well settled that the government cannot comment on the defendant's failure to incriminate himself. *Griffin* v. *California*, 380 U.S. 609 (1965); *Wilson* v. *United States*, 149 U.S. 60 (1893). It is equally prejudicial to refer to the fact that the defendant may have refused to risk self-incrimination at an earlier time,

such as before the grand jury, *Grunewald* v. *United States*, 353 U.S. 391, 416-24 (1957), or during police interrogation, *Helton* v. *United States*, 221 F.2d 338 (5th Cir. 1955). Yet the indictment does just that. Counts Three and Four are a formal government charge and "comment" on the petitioner's failure to confess to an essential element of Counts One and Two. It is like charging a man in one count with rape and in a second count with having the audacity not to confess. If the government had made the remark orally in court instead of in a second count, no court would hesitate to reverse. Consequently, petitioner was prejudiced on all four counts.

The Second Circuit took the rather untenable position that Counts Three and Four tended to exculpate the petitioner on Counts One and Two because his failure to register and obtain a wagering tax stamp could be interpreted as a denial that he was in the business of wagering and gambling. However, as the cases on improper "comment" show, the nature of the prejudice is that the government made the charge, not that the defendant might argue his innocence from the same circumstances. Surely the government was not seeking to exculpate the petitioner when it unconstitutionally charged him with failing to register and have a tax stamp.

Moreover, the Second Circuit's fanciful theory of exculpation is contradicted by the trial record. The evidence on Counts Three and Four was such that counsel for petitioner had to concede guilt on these counts in an attempt to maintain his credibility on Counts One and Two. He stated in summation:

> "Now it may be that from this evidence you will believe that with respect to counts 3 and 4 you

may find that in fact Mr. Kelley should have registered or should have had a tax stamp. I really can't come in good faith before you and argue that he was not involved in any way. It may be on those two counts that you may have to return a verdict of guilty . . . ." Supp. R. A7.

At issue here is whether the Second Circuit gave the proper full faith and credit to this Court's decision in *Marchetti*. Petitioner thinks not and contends that a summary reversal and remand for a new trial is the only proper disposition at this point.

3. Petitioner challenged the petit jury array on the ground that women were systematically excluded from the jury rolls. Women comprise only 12 per cent of the jury rolls in the Southern District of New York although they are over 50% of the general population. The reason is simple and conceded by all parties. The Jury Clerk, Mr. Borman, still honors the state law exemption for women, excusing them at their will. In sworn testimony in 1962 (made applicable by his affidavit filed in the case at bar),[11] Mr. Borman conceded that he ignored (1) the 1957 amendment to 18 U.S.C. § 1861, abolishing the applicability of state standards and (2) a bulletin from the Administrative Office of the United States Courts stating that state standards

[11] Mr. Borman testified during an evidentiary hearing in 1962 in *United States* v. *Van Allen*, 208 F. Supp. 331 (SDNY 1962), as to selection procedures in effect at that time. In the case at bar, Mr. Borman filed an affidavit stating that selection procedures in effect on January 1, 1958, had continued up until the case at bar with no change. Thus Mr. Borman's testimony in the *Van Allen* case is applicable to the case at bar.

on "sex" no longer applied.[12] The only time the Second Circuit got near the issue, it criticized the lawyers for raising the point. *United States* v. *Kelly*, 349 F.2d 720, 778 (2d Cir. 1965). This decision is in direct conflict with the Fifth Circuit case of *Rabinowitz* v. *United States*, 366 F.2d 34 (5th Cir. 1966) (en banc).

A true understanding of the Second Circuit's preference for upper middle-class male juries with whom it can feel comfortable requires a historical setting.

In the late 1930's, juries in the Southern District of New York were distinctly "clubby." The lists were submitted to the jury clerk by the Grand Jury Association made up of past and present grand jurors. They chose exclusively from such elite sources as the alumni directories of Ivy League colleges, the Social Register

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[12] On March 14, 1958, the Administrative Office of the United States Courts sent a bulletin to all jury commissions and jury clerks advising them that all persons fulfilling the new standards of the amended section 1861

> "are qualified as federal jurors, notwithstanding any state law disqualifying persons from jury duty in the state courts because of race *or sex*." R. 31a-32a. (Emphasis added.)

When questioned in 1962 in *United States v. Van Allen, supra*, Mr. Borman testified as follows about the effect the amendment had on his practices:

> "Q. So no change was made then by virtue of the amendment to the Civil Rights Act of 1957? A. That's right.
> "Q. What did you do with that bulletin which the Administrative Office sent up to you? I mean, what action did you take with respect to it? A. There wasn't any action to take other than to get the order from the Chief Judge to allow me to continue the exemptions under State law.
> "Q. Now, which Chief Judge do you say you had this— A. Judge Bondy." R. 31a-33a.

Mr. Borman, however, was confused. The order signed by Judge Bondy was signed in 1955, two years before the amendment to § 1861, R. 32a-33a, and no subsequent orders exist. R. 33a.

and Who's Who in New York. *United States* v. *Dennis*, 183 F.2d 210, 217 (2d Cir. 1950). This was to overcome the then established belief that the jury rolls were overcrowded "with relief workers and housewives." *United States* v. *Flynn*, 216 F.2d 354, 379 (2d Cir. 1954). After *Glasser* v. *United States*, 315 U.S. 60 (1942), in which the Court disapproved of a selection system in which women were selected only from the roster of the League of Women Voters, the jury clerk in the Southern District of New York broadened his source material to include select voter registration lists of the surrounding assembly districts, favoring those with more well-to-do inhabitants and ignoring those with Negro and Puerto Rican predominance. *United States* v. *Foster*, 83 F. Supp. 197, 205-07 (SDNY 1949); 216 F.2d at 379. Of this and similar selectivity procedures, the Second Circuit admitted in *Dennis*:

> "The clerks may have deliberately reduced the proportion of those whom they reasonably expected the judges would excuse on the score of hardship." 183 F.2d at 222.

But the Circuit approved:

> "We can see no reason why the clerks should not recognize in advance that there were groups which were poor risks, as it were: . . . ." *Ibid.*

Apparently, someone convinced the jury clerk that he was skating on thin ice in spite of appellate approval, since he instituted a true random selection system from all voting lists after *Foster* and *Dennis*. See *United States* v. *Flynn*, 216 F.2d at 379; *United States* v. *Greenberg*, 200 F. Supp. 382, 384 (SDNY 1961).

The next procedural step, however, was sufficient to absorb the damage any widening of the source might

impose. Prospective jurors from the voting lists were called in and interviewed by the jury clerk and his deputies. At this point, anyone who disclosed an exemption, disqualification, or financial hardship was eliminated with no record being made of the reason. The remainder filled out questionnaires. The jury clerk, at the time of *Flynn,* then made his eliminations on the basis of:

> "grounds specified in the federal or state statutes for incomplete questionnaires, misspellings, manner and appearance and the like." 216 F.2d at 380.

The screening process cut deep. Of those to whom notices were sent, only 15 to 20 per cent made it to the jury rolls. 216 F.2d at 380. And, once again, the Second Circuit told the jury clerk he could

> "recognize in advance that there were groups which were 'poor risks,' so long as those groups be not entirely excluded or limited to token representation." 216 F.2d at 386.

The figures on jury composition reported in *Flynn* are indeed shocking—the "manner and appearance" of manual workers were apparently not to the Jury Clerk's liking.[13]

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[13] The defendant had shown in *Flynn* that male manual workers constituted only 7 per cent of the employed males on the jury panels although they constituted over 50 per cent of the employed male population. Managers, officials, and proprietors constituted 44 per cent of the employed males on the panels although they represented only 15 per cent of the employed male population. Seven predominately Negro, Puerto Rican, working class assembly districts with 32 per cent of the Manhattan voting population had only 5.8 per cent representation on the jury panels. Five well-to-do assembly districts comprising only 40.7 per cent of the Manhattan voting population had 74.7 per cent representation on the panels. 216 F. 2d at 380-81.

At the time of *Flynn,* the jury clerk had some statutory basis for a high degree of selectivity, even if not for his winnowing of "poor risks." At that time, 18 U.S.C. § 1861, required that jurymen be qualified under state law. State law included not only the exemption for women, but such qualifications as "fair character," "approved integrity," "sound judgment," "well informed," and "intelligent." See 216 F.2d at 382, 388. This gave the clerk substantial latitude for subjective judgment.

The Civil Rights Act of 1958, however, amended 28 U.S.C. § 1861, to eliminate the applicability of state law qualifications. Thus every person over 21 was qualified unless he had conviction, was unable to read, write, or understand English, or had an incapacitating physical or mental infirmity.

As already pointed out, the jury clerk ignored Congress. About the only apparent change was to eliminate records of his winnowing process. Whereas half of those to whom jury notices were sent were rejected without any record being made at the time of *Flynn.* 216 F.2d at 380. By 1962, 75% were rejected without filling out a questionnaire. R. 31a. And, in conformity with *Flynn,* only 15% made the jury rolls. R. 31a. No one would believe, of course, that 85% of New York voters are convicts, illiterates or physically or mentally incapacitated. And, indeed, they would be right.

Faced with the obvious failure to comply with the 1957 amendment to § 1861, the Court in *Van Allen* v. *United States,* 208 F. Supp. 331 (SDNY 1962), *aff'd sub nom. United States* v. *Kelly,* 349 F.2d 720 (2d Cir. 1965), apparently felt that the doctrine of minimizing "poor risks" had run its course. It therefore

formulated a new doctrine to cover the same selection standards—the doctrine of "courteous custom." As stated by the court in *Van Allen*:

> "If, however, the person [prospective juryman] on his own initiative, before he was qualified, requested to be excused, the jury clerk would as a *courteous custom* place his name on the ineligible file, if such person asserted that he came within one of the exempt categories under state law." 208 F. Supp. at 336. (Emphasis added.)

The court did not believe that this "custom" violated the intent of § 1861 as amended, so long as the clerks did not affirmatively "impede such groups from serving on federal juries." *Id.* at 337. In following this practice the jury clerk "merely acquiesces in the public interest." *Ibid.* The Second Circuit affirmed this rationale *sub nom. United States* v. *Kelly,* 349 F.2d 720, 778-79 (2d Cir. 1965) by relying on decisions made prior to the amendment of § 1861.[14]

The legal error in *Van Allen* is irrefutable. It implies that the 1957 amendment to § 1861 abolishing state standards was against the public interest in New York, and it ignores this Court's directive in *Thiel* v. *Southern Pac. Co.,* 328 U.S. 217, 224-25 (1946), that all citizens have an obligation to serve absent a bona fide excuse. As this Court stated:

> "Jury service is a duty as well as a privilege of citizenship; it is a duty that cannot be shirked on

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[14] The only case relied on in *Kelly* postdating the amendment to Section 1861 was *United States* v. *Greenberg,* 200 F. Supp. 382 (SDNY 1961), *aff'd sub nom. United States* v. *Agueci,* 310 F. 2d 817 (2d Cir. 1962). This decision approved the use of voting registration lists as the primary source of names for prospective jurors. It did not reach the selection standards applied by the jury clerk after names were taken from voting registration lists.

> a plea of inconvenience or decreased earning power. Only when the financial embarrassment is such as to impose a real burden and hardship does a valid excuse of this nature appear." *Id.* at 224.

Women, of course are a proper class with which to measure the application of this obligation to serve. *Ballard* v. *United States,* 329 U.S. 187, 193-94 (1946). Moreover, as a legal interpretation of § 1861, the rational of *Van Allen* is in direct conflict with the Fifth Circuit decision in *Rabinowitz* v. *United States,* 366 F.2d 34 (5th Cir. 1966) (en banc). After an extensive review of the changes over the years in federal jury statutes and an analysis of the 1957 amendment to 1861, the court in *Rabinowitz* concluded that the jury clerk's only function was to enforce the naked standards of § 1861. It stated:

> "The federal qualifications are objective and precise, *requiring in their application no discretion on the part of the court clerk* and the jury commissioner. Since Congress only conferred discretion on the clerk and the commissioner by implication from the State's statutes, their discretion ceased to exist when the State qualifications were entirely swept away." *Id.* at 54. (Emphasis added.)

The Fifth Circuit then cited *United States* v. *Dennis,* 183 F.2d 201 (2d Cir. 1950), as an example of the selection system Congress intended to sweep away.

Petitioner chose to base his challenge on the exclusion of women since it is admitted they were automatically excused at their own request with no requirement of hardship or other quasi-valid basis for excusal. But with 75% of the prospective jurymen being excused without recorded reason, there can be little doubt the

deliberate winnowing of "poor risks" to a respectable and safe minimum continues. As Hans Zeisel, co-author of *The American Jury* (1966), told the United States Senate in March 1967:

> "In New York City you have a highly selective system with 50 per cent of the jurors college educated."

Hearings on S. 383 etc. Before the Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee, 90th Cong., 1st Sess., p. 123. And as Dale Broeder, who did research for the same book, told the Subcommittee, elimination of the bottom of the economic scale from the jury lists changes the pattern of jury voting and decisions. *Id.* at 62-63. What is really at issue here is a jury selection system in the Southern District of New York which for 30 years has been dedicated to the selection of upper middle-class male juries, Congressional statutes and statistical evidence of discrimination notwithstanding.

CONCLUSION

For all the foregoing reasons petitioner respectfully requests that the petition for writ of certiorari be granted.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 38—September Term, 1967.

(Argued April 1, 1968 Decided May 27, 1968.)

Docket No. 30971

UNITED STATES OF AMERICA, *Appellee*,

v.

JEREMIAH J. KELLEY, *Appellant*.

Before:

MOORE, WOODBURY* and SMITH, *Circuit Judges*.

Appeal from conviction on trial to the jury in the United States District Court for the Southern District of New York, Irving Ben Cooper, *Judge*, on one count of violation of 18 U. S. C. §§ 1084 and 2, aiding and abetting interstate transmission of wagering information, one count of violation of 18 U. S. C. §§ 1952 and 2, causing the use of interstate commerce in aid of racketeering enterprises—bookmaking in violation of N. Y. Penal Law § 986, and two counts of violation of 26 U. S. C. §§ 7203, 7262 and 7272—the federal gambling tax statutes. Conviction on counts 3 and 4 reversed and counts 3 and 4 dismissed. Judgment of conviction on counts 1 and 2 affirmed.

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* Of the First Circuit, sitting by designation.

PETER R. TAFT, Washington, D. C. (Vincent J. Fuller, Washington, D. C., on the brief), *for appellant.*

DOUGLAS S. LIEBHAFSKY, Asst. U. S. Attorney, Southern District of New York (Robert M. Morgenthau, U. S. Attorney, Michael S. Fawer and Michael W. Mitchell, Asst. U. S. Attorneys, on the brief), *for appellee.*

SMITH, *Circuit Judge:*

This is an appeal from a judgment of conviction entered after a jury trial before Judge Irving Ben Cooper, Southern District of New York. Kelley was convicted and sentenced consecutively with respect to all four of the counts charged. Count 1: being engaged in the business of wagering and causing a telephone to be used in interstate commerce for the transmission of information assisting in the placing of bets or wagers. 18 U. S. C. §§ 1084(a) and 2. Count 2: causing a telephone to be used in interstate commerce to promote, manage, carry on, facilitate, or etc. on unlawful activity in violation of New York Penal Law § 986. 18 U. S. C. §§ 1952 and 2. Counts 3 and 4 involved violation of the Federal Gambling Tax statutes, 26 U. S. C. §§ 7203, 7262 and 7272. Reversal of the conviction on counts 3 and 4 is required by *Grosso* v. *United States*, 88 S. Ct. 709 (1968) and *Marchetti* v. *United States*, 88 S. Ct. 687 (1968). We find no error in the convictions on counts 1 and 2 and affirm the judgment on those counts.

Kelley, a bookmaker, operating in New York City in violation of New York law, constantly kept in touch with his clients in order to determine their willingness to place bets with him. On Kelley's instruction, a customer desiring to place a bet would call 212-EL 5-2828, at the Sherry-Netherland Hotel and ask for the fictitious "Mr. Mellon." He would be told that Mr. Mellon was not in. The bettor

would then give the operator a code name previously decided by both the bettor and Kelley. Kelley would then call back, since he had each customer's home and business phone numbers, to receive the bet. The government's theory of the case is that the clients' calls to the Sherry-Netherland from outside New York State constitute use or transmission by Kelley of a facility in interstate commerce to promote an unlawful activity and transmission of gambling information.

Counts 3 and 4 must fall in light of the Supreme Court's decisions in *Grosso* v. *United States*, 88 S. Ct. 709 (1968), and *Marchetti* v. *United States*, 88 S. Ct. 687 (1968). Appellant's further argument that the joining of counts whose statutory basis is later declared unconstitutional on single indictment and trial with other counts whose validity is unchallenged creates constitutional error with respect to convictions for the violation of the unchallenged statutes is without merit.

Reversal of the conviction on counts 3 and 4 does not require a reversal and new trial on counts 1 and 2. The mere presence of unconstitutional counts is not prejudicial and was not tantamount to an improper comment upon appellant's failure to testify. If the presence of counts 3 and 4 "confounded and embarrassed" the defense to counts 1 and 2, a motion should have been made to sever. Failing this, appellant's present claim of prejudicial joinder is now foreclosed. *United States* v. *Perl*, 210 F. 2d 457, 461-62 (2d Cir. 1954). Furthermore, there was no prejudice to appellant. The only proof adduced on counts 3 and 4 which was not independently admissible on counts 1 and 2 as well was the stipulated testimony of records witnesses, offered to show appellant's failure to register or pay the wagering tax. This proof had no tendency to establish that he was a gambler—if anything, it suggests the contrary.

Appellant's several other points are also without merit.

A person may be held responsible as a principal under 18 U. S. C. § 2(b) for causing another to do an act which

would not have been criminal if directly performed by that other person. *United States* v. *Lester*, 363 F. 2d 68, 72-73 (6th Cir. 1966), cert. denied 385 U. S. 1002 (1967). The evidence showed that appellant told these bettors how to get in touch with him if they wished to make a bet and, therefore it was reasonable to expect that they would make interstate calls. This is sufficient to find that he "caused" the interstate calls. *United States* v. *Scandifia*, 390 F. 2d 244 (2d Cir. 1968); *Bass* v. *United States*, 324 F. 2d 168 (8th Cir. 1963).

The telephone calls to the EL5 number informed appellant that someone was ready to place a bet and how that person could be reached. This is certainly "information assisting in the placing of bets or wagers" within the meaning of 18 U.S.C. § 1084.

Appellant was not prejudiced by the fact that counts 1 and 2 contained multiple violations. First, the objection may be deemed waived by failing to raise it prior to trial as required by Rule 12(b)(2) of the Federal Rules of Criminal Procedure. Second, the government had furnished a bill of particulars several months before the first trial setting forth all the specific telephone calls which it intended to prove. Third, as was noted in *United States* v. *Cohen*, 35 F. R. D. 227, 231 (N. D. Cal. 1964), affirmed 378 F. 2d 751, 754 (9th Cir.), cert. denied 389 U. S. 897 (1967), "[t]he offense was a continuing course of conduct, and in that respect might, to the advantage of the defendant, be treated as one course of conduct and one offense."

The jury selection process of this Circuit was recently approved in *United States* v. *Kelley*, 349 F. 2d 720, 778 (2d Cir. 1965), cert. denied 384 U. S. 947 (1966). We adhere to that ruling.

Appellant contends that the court should have ordered an eavesdropping investigation. We disagree. *Kolod* v. *United States*, 36 L. W. 3306(1968), in which the Supreme Court

ordered the Solicitor General to make an investigation and to present his findings to the district court in that case to determine whether evidence obtained from unlawful eavesdropping was used at the trial, does not invite every federal defendant to go on a fishing expedition such as appellant requests when there is no suggestion of eavesdropping. See *United States* v. *Franzese,* slip opinion pp. 1697, 1718 (2d Cir. 1968). No basis is shown for an investigation here.

Appellant further contends that evidence found on his person at the time of arrest should have been suppressed. We find no support for this contention. The one day delay in arresting appellant is not ground for suppressing the evidence found on his person. *McKnight* v. *United States,* 183 F. 2d 977 (D. C. Cir. 1950), is distinguishable, in that in that case the delay was used as a device to make a search of premises for which a search warrant admittedly could not have been obtained. Compare *United States* v. *Joines,* 258 F. 2d 471 (3d Cir. 1958), *Seymour* v. *United States,* 177 F. 2d 732 (D. C. Cir. 1949).

The conviction on counts 3 and 4 is reversed and these counts of the indictment are ordered dismissed. The judgment of conviction on counts 1 and 2 is affirmed.

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No. 426

In the Supreme Court of the United States

OCTOBER TERM, 1968

JEREMIAH J. KELLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 395 F. 2d 727.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 1968. A petition for rehearing was denied on July 22, 1968. The petition for a writ of certiorari was filed on August 21, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's activities constituted the use of interstate telephone facilities in the business of wagering in violation of 18 U.S.C. 1084 and 18 U.S.C. 1952.

2. Whether petitioner's convictions for violation of 18 U.S.C. 1084 and 18 U.S.C. 1952 are vitiated because the jury also convicted him for failing to register as a person engaged in the business of accepting wagers and to pay the special tax thereon.

3. Whether petitioner was convicted by an unlawfully convened petit jury.

STATEMENT

After trial by jury in the Southern District of New York, petitioner was convicted of four counts charging him with, respectively, using interstate telephone facilities for the transmission in commerce of information assisting in the placing of wagers in violation of 18 U.S.C. 1084, using such facilities with intent to carry on an unlawful gambling activity in violation of 18 U.S.C. 1952, failing to pay the special tax imposed upon persons engaged in the business of accepting wagers, and failing to register as a person engaged in such business. He received, pursuant to 18 U.S.C. 4208(b), the maximum sentence on each count (two years, five years, one year and one year imprisonment respectively), subject to modification after study conducted pursuant to 18 U.S.C. 4208(c). The court of appeals, on the authority of *Grosso* v. *United States*, 390 U.S. 62, and *Marchetti* v. *United States*, 390 U.S. 39, reversed his convictions on the tax and registra-

tion counts, but affirmed his conviction on the other two counts.

The evidence shows that petitioner, a bookmaker, instructed his clients to call a number at a hotel in New York City (in the Southern District of New York) and ask for a fictitious name when they desired to place a wager. The operator would inform them that the person was not in, and they would thereupon give the operator a code name previously agreed upon between them and petitioner. Thereafter, petitioner would call them from his home in Brooklyn and consummate the wager. The indictment was based upon telephone calls made to the New York City number from outside New York state.

ARGUMENT

1. Petitioner was properly convicted of causing the use of interstate telephone facilities to carry on his bookmaking business. It is immaterial that his clients did not themselves violate the two statutes by calling the New York City number for the purpose of making wagers; he was not charged with causing them to act unlawfully. He was charged, rather, with causing the use of the telephone facility in New York City as a device for carrying on *his own* unlawful bookmaking activities and for transmitting information in aid thereof in interstate commerce. Petitioner was no social bettor whom (as the legislative history cited by petitioner shows) Congress did not intend to punish. He was the type of professional at whom the statutes were aimed. When he caused his clients to use the telephone for his business, he personally vio-

lated the statute, as much as if he had caused any other innocent party, *e.g.*, a temporary-hire secretary, to do so.

2. The reversal as to counts based on failure to pay the gambling tax did not require reversal of the conviction on the other counts. Petitioner's activities as a bookmaker were amply proved by independent evidence, which was as necessary to the remaining counts as to those concerned with the tax. It is unrealistic to assume that a jury would interpret a charge of failing to pay the tax as a comment on petitioner's failure to incriminate himself.

3. Petitioner, instead of supporting his challenge to the petit jury array by independent evidence, relied on the record made in *United States* v. *Van Allen*, 208 F. Supp. 831 (S.D.N.Y.), affirmed *sub nom. United States* v. *Kelly*, 349 F. 2d 720, 777-779 (C.A. 2), certiorari denied, 384 U.S. 947, where a similar challenge was denied (see Pet. 17, n. 11). As petitioner concedes, the jury clerk of the Southern District has "instituted a true random selection system" for obtaining the names of prospective jurors (Pet. 19). Petitioner's objection, rather, is to the manner in which women are excused from service, once they have been selected in a non-discriminatory manner. But there is no basis for suggestion that women are forcibly removed as potential jurors or excused against their will; they are simply not placed on the list if they do not wish to serve. This practice of freely granting excuse is similar in nature to the statutory exemption established by Congress in the District of Columbia (D.C. Code, § 11-1418), and violates neither the Constitution (*Hoyt* v. *Florida*, 368 U.S. 57) nor the statutory

scheme. *Chance* v. *United States*, 322 F. 2d 201, 204 (C.A. 5), certiorari denied, 379 U.S. 823.

Rabinowitz v. *United States*, 366 F. 2d 34 (C.A. 5), concerned the process by which potential jurymen were initially selected rather than the grounds for their subsequent excuse, and thus is not apposite to the present case. Further, the 1957 legislation on which petitioner relies contains no indication on what, if any, basis persons called to federal jury service might be exercised. S. Rep. No. 891, 90th Cong., 1st Sess., p. 10. At all events, the issue is resolved for the future by the newly enacted Jury Selection and Service Act of 1968 (P.L. 90-274, 82 Stat. 53) which goes into effect on December 22, 1968. The Act establishes for the first time uniform procedures for the granting of excuses on request by individual members of specified classes of jurors. New 28 U.S.C. 1863 (b) (5). There is thus no question of general importance raised in the petition.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1968.

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